BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Implementation of the	)	
Cable Television Consumer	)	MM Docket No. 92-264
Protection and Competition	)	
Act of 1992	)	
	)	
Horizontal and Vertical Ownership	)	
Limits, Cross-Ownership	)	
Limitations and Anti-Trafficking	)	
Provisions	)	

To: The Commission

COMMENTS OF NATIONWIDE COMMUNICATIONS INC.

Nationwide Communications Inc. ("NCI"), by its attorneys, hereby files it comments in response to the Notice of Proposed Rule Making, released December 28, 1992, in the above-captioned proceeding (the "Notice").

Part of section 11 of the Cable Television Consumer Protection and Competition Act of 1992 (the "Act") amends Section 613(a) of the Communications Act to prohibit a cable operator from holding an MMDS license or offering SMATV service "separate and apart from any franchised cable service in any portion of the franchise area served by that cable operator's cable system." As the Commission recognizes in paragraph 26 of the Notice, the legislative history of the Act indicates that this cross-ownership prohibition is not intended to prevent the common ownership of a SMATV system that itself qualifies as a "cable system" under section 602(6) of the

Communications Act,[1] and a second separate stand-alone SMATV system. In these Comments, NCI reviews the relevant legislative history and demonstrates that based on that history, as well as on the need to promote competition in the multi-channel video programming market, the Commission must exempt the operators of SMATV-owned "cable systems" from any cable/SMATV cross-ownership prohibition.

I. Congress Did Not Intend the Cable/SMATV Cross-Ownership Prohibition to Apply to Operators of SMATV-Owned "Cable Systems".

A review of the legislative history of section 11 of the Act confirms the Commission's statement that Congress did not intend the Cable/SMATV cross-ownership prohibition to apply to operators of SMATV systems that are defined as "cable systems" under section 602(6) of the Communications Act ("SMATV-owned `cable systems'"). While the Conference Report on the Act does not substantially

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[1] The Act defines "cable system" therein as:

> a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, but such term does not include ... (B) a facility that serves only subscribers in 1 or more multiple unit dwellings under common ownership, control or management, unless such facility or facilities uses any public right-of-way ....

Many SMATV systems which are clearly not traditional cable systems, and which compete against traditional cable systems, fall under the statutory definition of "cable system" because part of the system crosses a public right-of-way.

interpret the Cable/SMATV cross-ownership provisions of Section 11, it notes that the Conference adopted this provision from the Senate bill (S.12).[2] The Senate Committee Report on S.12 notes, inter alia, that traditional cable operators enjoy largely monopoly status, that the public would benefit from the injection of competition into the multi-channel video market, and that "wireless cable" systems (such as MMDS and SMATV operators) have the potential to be substantial competitors of cable operators.[3] In that context, the Senate Report goes on to analyze the Cable/SMATV-MMDS cross-ownership prohibition that was ultimately adopted into the Act, and states that:

> [t]he Committee does not intend for this prohibition to apply to common ownership of a SMATV system that qualifies as a "cable system" under section 602(6) of the 1934 Act and a stand-alone SMATV system.[4]

The above-cited language from the Senate Committee Report clearly and unambiguously demonstrates Congress' intent that the Cable/SMATV cross-ownership prohibition in section 11 of the Act should not apply to operators of SMATV systems which, because some of their operations cross public rights of way, are consequently defined as "cable" systems. The Commission must enact rules

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[2] H.R. Rep. No. 862, 102d Cong., 2d Sess., at 82 (1992).

[3] Senate Committee on Commerce, Science, and Transportation, S. Rep. No. 92, 102d Cong., 1st Sess., at 8-15 (1991) (hereinafter the "Senate Report").

[4] Id. at 81.

consistent with this intent.[5] It is clear from the legislative history that Congress was concerned about the overwhelming market power possessed by most traditional cable operators, and intended the cross-ownership prohibition to limit the ability of only those cable operators, who provide separate SMATV service in their franchise areas in an attempt to block competition from smaller and more vulnerable independent SMATV operators. Accordingly,

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[5] Cf. Cable Television Sports Programming Report and Order, 54 FCC 2d 265, 278 (1975) wherein the Commission stated:

> Since the inception of this proceeding, Congressional policy has been the primary element of our concern and the main thrust of our inquiry has been directed toward a determination of Congressional intent. The existence of clear Congressional intent concerning the issues relevant to this proceeding would be strong evidence of public policy which we must follow in reaching our final determination.

Of course, if the Commission were to ignore the unambiguous intent of Congress on this issue and fail to exempt SMATV-owned "cable systems" from the cross-ownership prohibitions, such an action would be reversed upon review by an appellate court. See Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837,843 n.9, wherein the Supreme Court stated that:

> [t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.

"Traditional" tools of inquiring into congressional intent include review of legislative history. See Washington Hospital Center v. Bowen, 795 F.2d 139,143 (D.C. Cir. 1986).

operators of SMATV systems that meet the definition of "cable systems" because they cross a public right-of-way must not be prohibited from acquiring or constructing other stand-alone SMATV systems or SMATV-owned "cable systems".

II. Exemption of Operators of SMATV-Owned "Cable Systems" From the Cross-Ownership Prohibition Will Promote Competition

Underlying the Cable Television Consumer Protection and Competition Act of 1992 is Congress' intent to protect consumers from unreasonable rates, and to promote competition in the provision of multi-channel video services.[6] Congress recognized that the accomplishment of the second goal (the emergence of true competition in this market) would itself advance the first goal (the protection of consumers).[7] The exemption of operators of

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[6] See Sections 2(a)(1), 2(a)(2) and 2(b) of the Act; See also House Committee on Energy and Commerce, H.R. Rep. No. 102-628, 102d Cong., 2d Sess. at 26 (1992) (hereinafter, the "House Report"):

> H.R. 4850 is designed to address the principal concerns about the performance of the cable industry and the development of the market for video programming since passage of the [1984] Cable Act. This legislation will protect consumers by preventing unreasonable rates ... and by sparking the development of a competitive marketplace.

[7] See House Report at 30:

> The Committee believes that competition ultimately will provide the best safeguard for consumers in the video marketplace and strongly prefers competition and the development of a competitive marketplace to regulation. The Committee also recognizes, however, that until true competition develops,

SMATV-owned "cable systems" from the cross-ownership prohibition is necessary to promote a level field on which emerging but vulnerable players such as independent SMATV operators can compete with traditional cable operators.[8]

NCI owns and operates Eaglevision, a private cable system serving nearly 80,000 multiple unit dwellings in Houston, Texas, via a hybrid of master antenna television systems, satellite master antenna television systems, and community antenna television systems. Service to most of these dwellings is provided pursuant to a non-exclusive franchise granted by the city of Houston. NCI obtained this franchise largely to avoid delays in obtaining street crossing permits. In the Houston market, NCI's Eaglevision system competes head to head with major traditional cable operators such as TCI and Warner-Amex. TCI and Warner do not compete against each

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> some tough yet fair and flexible regulatory measures are needed.
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> See also Senate Report at 18.

[8] Of course, NCI supports the application of the cross-ownership prohibition to traditional cable operators in order to prevent them from offering SMATV service separate from and in addition to franchised cable service, with the purpose of blocking out competition from independent SMATV operators. The cross-ownership prohibition mandated in the Act creates a regulatory barrier to this anti-competitive behavior.

The promotion of competition through the cross-ownership prohibition also "dovetails" with the uniform geographic rate structure requirements set out in section 3 of the Act. While the cross-ownership prohibition is an attempt to prevent established cable operators from blocking or buying out competitors, the uniform geographic rate requirement is an attempt to prevent established cable operators from destroying competitors by predatory rate practices.

other, and Eaglevision provides the major competitive check on the market power of each of these cable giants. Large systems operated by major MSOs such as Warner and TCI have substantial competitive advantages over smaller operators such as Eaglevision: they have larger subscriber bases, which give them lower per-unit subscriber programming costs and promotional advertising costs. If the proposed cross-ownership prohibition were to be applied to Eaglevision, its ability to obtain a larger customer base so that it can reduce its costs, and thus its rates, will be hampered.

More importantly, if the proposed cross-ownership prohibition were applied to Eaglevision, its ability to build and obtain other SMATV systems, and thus its ability to offer a competitive alternative to the larger traditional cable systems, would be substantially eliminated. Houston consumers would be the major losers here: they would lose the ability to chose a competitive alternative to major cable operators, and the reduction of competition will have a predictable result on their cable rates. It would be ironic, as well as arbitrary and capricious, if the application of the cross-ownership prohibition, which was designed to promote competition, in fact eliminated that competition.

Accordingly, NCI applauds the Commission's recognition that the cross-ownership prohibition mandated in the Act is intended to promote competition (Notice at para. 24), and its recognition that Congress did not intend for this prohibition to prevent the common ownership of a SMATV system that itself qualifies as a "cable

system" under the Communications Act, and a separate stand-alone SMATV system (Notice at para. 26). The Commission's regulations must comply with Congress' intent, and doing so will serve the public interest by promoting competition in the multi-channel video programming market, thus leading to lower rates paid by consumers for such programming.

Respectfully submitted,

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